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SUPPLEMENTAL MEMORANDUM REFUTING SPRINT'S ALLEGED "ANECDOTAL EVIDENCE OF DEGRADED PRACTICES BEING EXPORTED FROM SBC TO PACIFIC BELL AFTER THEIR MERGER"

Submitted By

SBC Communications Inc.
and
Ameritech Corporation

April 13, 1999

SUPPLEMENTAL MEMORANDUM REFUTING SPRINT'S ALLEGED "ANECDOTAL EVIDENCE OF DEGRADED PRACTICES BEING EXPORTED FROM SBC TO PACIFIC BELL AFTER THEIR MERGER"

I. INTRODUCTION.

The so-called "Empirical Analysis Of The Footprint Effects of Mergers Between Large ILECs" submitted on behalf of Sprint by Hayes-Jayaratne-Katz ("Sprint's April 1 Paper") asserts that there is evidence of post-merger problems following SBC Communication Inc.'s ("SBC") acquisition of Pacific Bell ("PacBell") in April, 1997. In particular, Hayes-Jayaratne-Katz argue, based on an April 1, 1999, Memorandum from Sprint's counsel, that there is "anecdotal evidence of degraded practices being exported from SBC to Pacific Bell after their merger." Sprint's April 1 Paper at 24.

This is the latest attempt by Sprint to bolster its unprecedented and unsupported "negative spillover" theory. As the following discussion shows, in fact, the anecdotes do not support any inference that SBC exported degraded practices to PacBell following the merger. Indeed, the story of what took place in California following the merger is completely inconsistent with any alleged exportation of degraded practices to PacBell following the merger. See Supplemental Memorandum Regarding The Improved Support Of Local Competition In California Following The SBC-Pacbell Merger.

II. THE ANECDOTAL EXAMPLES DO NOT EVIDENCE "DEGRADED PRACTICES BEING EXPORTED FROM SBC TO PACIFIC BELL AFTER THEIR MERGER."

Hayes-Jayaratne-Katz, relying in part on an April 1, 1999, Memorandum prepared by Sprint's counsel, argue that four incidents provide anecdotal evidence SBC's export of degraded practices to PacBell following the merger. Sprint's April 1 Paper at 24-25. As the facts set forth below clearly show, none of these anecdotes supports an allegation of post-merger degradation instituted by SBC.

A. Hayes-Jayaratne-Katz's Claim That MCI's Complaints About The Switch From The CABS Billing System To CRIS Shows Post-Merger Degradation Is False.

Other than PacBell, all of the RBOCs have used a CLEC billing system known as "Customer Record Information Systems" or "CRIS" to bill resale services. PacBell, on the other hand, at the request of the CLECs, had initially used a billing system known as "Carrier Access Billing System or "CABS" to bill resale services. While PacBell pursued the conversion of resale billing from CABS to CRIS early in 1996, due to negotiations with the CLECs, the conversion did not occur until after the merger was completed. UNEs and facilities have always been billed in CABS.

One CLEC, MCI Worldcom, had complained before the California Public Utilities Commission ("CPUC") in the 271 proceeding that the SBC-PacBell merger caused PacBell to abandon CABS in favor of CRIS for resale billing, which MCI asserted was less useful. In fact, (1) this change was unrelated to the SBC merger, (2) resulted in significantly better service to CLECs, and (3) PacBell reimbursed MCI, AT&T and Sprint for their costs of switching. The change from CABS to CRIS

for resale billing is clearly inconsistent with any alleged exportation of degraded practices by SBC.

In 1995-96, even before passage of the Telecommunications Act of 1996, California was at the forefront of considering ways to enhance local competition. During these early discussions, PacBell agreed with the three major interLATA carriers to use its "CABS" system to bill basic exchange resale services. At the time, PacBell envisioned that only a small part of PacBell's service – namely POTS lines – would be available to CLECs. CABS was the same billing system PacBell was currently using to bill access services sold to interLATA carriers. As a result, it made sense at that time to comply with the CLECs' request that PacBell use the CABS system to bill the new resold service.

Later, as decisions by the California PUC and the FCC revealed the extent to which ILECs would be required to offer all telecommunications retail services for resale, it became apparent that CABS would be an inefficient billing system for this purpose. PacBell was required to make much more than POTS available for resale, and billing for all of these services in CABS required PacBell to rebuild every resale option – even though these products and services were already programmed into PacBell's CRIS billing system.

As a result, even before the SBC merger, PacBell realized the inefficiency of creating billing for each resale offering in CABS and decided to convert resale billing to a CRIS-based system. At the time, the smaller CLECs had little concern over the change because only one of them had adopted automated ordering systems

keyed to the CABS format. None of these smaller CLECs appears to have objected to the change from CABS to CRIS or filed any complaint with the CPUC.

All three of the major CLECs (AT&T, MCI and Sprint), however, not only had interconnection agreements specifying the CABS format, but they also claimed to have invested substantially in automated ordering systems based on CABS. As a result, PacBell negotiated with the three big CLECs (AT&T, MCI and Sprint) to agree to move from CABS to CRIS. In March, April and May, 1998, they each signed a Memorandum of Understanding with PacBell waiving their claims concerning this change. MCI, for example, agreed to "waive what MCI believes to be its legal right to require Pacific to bill MCI for resale services provided under the Interconnection Agreement in CABS format." PacBell-MCI MOU ¶ 1(b). In exchange for this agreement, PacBell, among other things, agreed to reimburse MCI for its costs of conversion. Id. at ¶ 1(i).

AT&T and Sprint negotiated similar agreements by which they agreed to move to CRIS in exchange for PacBell's commitment to reimburse them for their associated costs. Id. at ¶¶ 1(d) and 1(c). Reimbursement payments have now been made to MCI, Sprint and AT&T by PacBell.

PacBell's cooperative program for compensation shows that the switch from CABS to CRIS was not designed as an anticompetitive or cost raising device. In addition, the decision to switch from CABS to CRIS predated the merger.

There is no evidence that the switch caused any harm to the CLECs, and in fact the switch had the effect of greatly enhancing the efficiency of CLEC resale

billing and ordering from PacBell. The one concern that CLECs have voiced since the switch – about receipt of multiple bills – has been addressed by PacBell through the offering of consolidated bill rounds. Moreover, the necessity of multiple bills is more than offset by the other benefits of the CABS to CRIS switch to CLECs and their retail customers:

a. **CRIS Is Consistent With The Systems Used By All Other RBOCs.** Because all the other RBOCs have always used CRIS for CLEC resale billing, PacBell believes that multi-state CLECs will now be able to take advantage of significant economies both in systems and employee training.

b. **CRIS Allows Direct Access To PacBell's Electronic Retail Ordering Platforms.** PacBell offers two electronic ordering platforms for resale services, Starwriter and SORD, which could not be used for preordering or to place resale orders when resale orders were billed from the CABS system. Manual ordering was the usual methodology employed by CLECs in the past. Electronic ordering of the type now available following the CRIS conversion is much more efficient and reliable. Without switching from CABS to CRIS, CLECs would not have been able to take advantage on these new, much more efficient ordering systems.

c. **CRIS Bills Are Much More Accurate And Timely.** Using CRIS, PacBell has been able to reduce pre-bill validation errors by 60%, and reduce overall billing errors by 84%.

d. **CRIS Allowed CLECs To Achieve Parity With PacBell's Retail Operations**. PacBell had all along used the CRIS system for its own retail operations. By switching CLEC resale billing from CABS to CRIS, the resale CLECs achieved parity with PacBell's retail operations.

e. **Enhanced Emergency Database**. Under CABS resale billing, the emergency 911 database needed to be updated manually. Under CRIS resale billing, this database can now be updated through an automatic electronic feed, which not only improves the timeliness of updates to the database, but also improves the accuracy of the updated information.

f. **Shorten The Time For Orders Changing Service**. Under the CABS system, it took approximately 3 days to implement orders changing service from retail to resale. Billing resale services in CRIS allows this change to be implemented in approximately 1 day instead of 3.

The facts relating to the switch from CABs to CRIS demonstrate that it is inconsistent with any alleged degradation of practices.

B. Hayes-Jayaratne-Katz's Claim That AirTouch's Complaints About "Calling Party Pays" Show Post-Merger Degradation Is False.

Hayes-Jayaratne-Katz and the Memorandum from Sprint's counsel assert that AirTouch has filed a complaint with the CPUC about PacBell's alleged anti-competitive conduct in refusing to participate in the Calling Party Pays market trial. Sprint's April 1 Paper at 24. Remarkably, however, they do not even disclose

that more than three months before their papers were prepared and filed with this Commission, the California Commission totally rejected this allegation.

On December 17, 1998, the California PUC dismissed AirTouch's claim with respect to "Calling Party Pays" or "CPP" billing and collection. See Ex. 1. The CPUC held that "Pacific's interpretation of the tariff is correct, that AirTouch is not entitled to purchase billing and collection services under the tariff, and that Pacific has therefore not violated any order, rule or regulation of the Commission by refusing to sell AirTouch such services under the tariff." Ex. 1 at 1. The issue was also expressly dismissed by this Commission as a subject for consideration in merger proceedings in the SBC/SNET Order. See Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp. To SBC Communications Inc., CC Dkt. No. 98-25, Memorandum Opinion and Order, 13 FCC Rcd 21292, ¶ 29 (1998).

The fact that the California PUC dismissed AirTouch's claim shows very clearly that the AirTouch example does not support any alleged post-merger degradation.

C. Hayes-Jayaratne-Katz's Claim That AT&T's Complaint About The PacBell OSS Appendix Shows Post-Merger Degradation Is False.

Hayes-Jayaratne-Katz and the Sprint counsel Memorandum assert that AT&T's displeasure with PacBell's OSS proves that SBC degraded PacBell's support

of local competition following the merger. Sprint's April 1 Paper at 24-25. The facts show this assertion to be completely false.

Prior to the PacBell-SBC merger, most if not all access by CLECs to the ILECs' operational support systems ("OSS") for pre-ordering, ordering, provisioning, maintenance/repair, and billing of unbundled network elements ("UNEs") was handled manually by PacBell. Manual systems are generally more time consuming, costly and less accurate than electronic systems.

Following the merger, PacBell and SBC began conferring about these CLEC interfaces and determined that SBC was far ahead of PacBell in developing electronic interfaces to facilitate CLEC ordering. As a result, following the merger, several OSS systems, which had been developed or implemented by SBC, were adopted by PacBell and made available to CLECs. These included Electronic Data Exchange ("EDI"), the Local service request Exchange system ("LEX"), Verigate, and DataGate. Thus, because SBC brought new, electronic systems for CLEC interface, the merger greatly improved the CLEC interfaces being offered by PacBell. In addition, CLECs had the advantage of a consistent set of OSS systems being offered in SBC's seven-state region – a consistency which makes multi-region service by CLECs easier and less costly, not the reverse.

Since the merger, PacBell has invested more than $63 million in implementing electronic interfaces for CLEC operations. In the 16 months before the merger, PacBell had spent approximately $1.3 million on electronic interfaces

for CLECs. In the 16 months following the merger, this investment increased to $59.4 million – an increase of more than 45 fold.

Despite these CLEC interface improvements, CLECs have complained about PacBell's negotiation of the so-called OSS Appendix. The OSS Appendix, however, is merely an Appendix to an Interconnection Agreement which spells out the commercial side of the relationship between PacBell and a CLEC regarding access to the improved electronic interfaces.

The first CLEC to negotiate an OSS Appendix with PacBell was AT&T. On April 28, 1998, prior to the 271 workshops, PacBell completed negotiations with AT&T over an OSS Appendix which was filed with the CPUC on May 11, 1998. This version of the OSS Appendix was the product of arm's length negotiation with AT&T, and contains the parties' respective rights and obligations with respect to use of PacBell's proprietary OSS systems.

Subsequently, in the 271 workshops, PacBell offered the AT&T OSS Appendix as a starting point for discussions. The final collaborative version of the OSS Appendix adopted by the CPUC in December, 1998, retained most of the substance of the AT&T OSS Appendix. The CPUC added several provisions proposed by PacBell relating to OSS systems omitted from the AT&T OSS Appendix because AT&T had no interest in such systems, as well as certain other provisions that had been incorporated by reference only in the AT&T OSS Appendix.

One issue raised by the CLECs during the 271 workshops was how to handle new interfaces or changes to existing interfaces, both of which require amendments

to existing OSS Appendices. CLECs, in particular AT&T, had charged that PacBell had changed or updated OSS interfaces without notifying CLECs or seeking CLEC input and recommendations. This issue has been resolved with the help of the CPUC staff in the "OSS OII" proceeding. PacBell, the CLECs, and the CPUC staff have developed a procedure called the "Change Management Process," whereby CLECs will receive notice from PacBell of proposed OSS interface changes, have an opportunity for input on the proposed changes, and a (non-binding) vote on proposed changes. The settling parties, including Sprint, filed a joint settlement agreement including the agreed to Change Management Process with the California Public Utilities Commission on January 20, 1999 (copy attached as Exhibit 2).

This history of PacBell's OSS, including the many improvements in automated CLEC ordering systems which were imported from SBC to PacBell, clearly shows that there was no degradation in OSS following the merger.

D. Hayes-Jayaratne-Katz's Claim That Sprint's Displeasure With The Need To Pay For DSL Line Conditioning And Assessment Of Availability Shows Post-Merger Degradation Is False.

Hayes-Jayaratne-Katz and Sprint's counsel assert that other evidence of degraded practices includes PacBell's insistence in negotiations for renewed interconnection agreements that Sprint begin paying for DSL line conditioning and availability assessments. Sprint's April 1 Paper at 25. This claim of degradation is also false.

As the Commission and staff are aware, the name Digital Subscriber Line ("DSL") applies to a number of different technologies that provide high speed

services at various costs and speeds to transmit digital messages over existing copper line that is used to provide "plain old telephone service" or "POTS." The service is directed primarily at small business and professionals who desire high speed access to the Internet or to corporate LANs.

The DSL telephone line service competes with a number of alternative technologies, including: (1) cable modem access bundled with transport and Internet services now offered by TimeWarner, Daniels Cablevision, Cox Cable, Southwestern Cable and TCI's @Home; (2) satellite service providers such as DirectTV which also offer satellite-based Internet access and high speed data transmission; (3) Internet Service Providers which, in conjunction with other carriers, such as Brainstorm Networks, Concentric, Direct Network Access, offer a bundle of services; and (4) CLECs such as GTEC, Covad, Northpoint Communications and Rhythms Netconnection.

There are many different types of DSL services, such as asymmetric digital subscriber service or ADSL, high-bit-rate digital subscriber service or HDSL, integrated services digital network or IDSL. DSL capable loops are POTS lines that have been specially conditioned for DSL use. In the case of ISDN or IDSL lines, PacBell must usually install repeaters on longer lines. For use as ADSL or the other types of DSL, the repeaters, load coils and some bridge taps must be physically removed. This process is known as "line conditioning" and it can cost a great deal to perform on some lines.

In addition to line conditioning costs, there are limits on the availability of certain DSL capable loops based on the distance from the Central Office. Generally, distances over 17,500 feet are troublesome and will not function properly for ADSL. Pacific has developed an indicator that appears in its preordering systems that indicate the loop length. However, physical inspection of records or physical inspection of the loop may be required to determine the availability of a DSL capable loop for particular locations.

At the time the initial interconnection agreements were negotiated in 1996 and 1997, DSL service was in its infancy. Indeed, the FCC has very recently characterized these types of advanced services as "nascent" and in "the early stages of development" even today. Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Dkt. No. 98-147, First report and Order and Further Notice of Proposed Rulemaking, FCC 99-48 at ¶2 (rel. March 31, 1999).

As a result, the fact is that in 1996 and 1997 no one realized the costs of line conditioning and determining line availability. The significance of these costs has become clear as PacBell has actually begun provisioning such lines recently.

As a result, as new requests for interconnection are received or existing interconnection agreements expire, PacBell has proposed that the CLECs reimburse it for the costs actually incurred in conditioning individual lines and in determining the availability of a line in a particular location. Since these costs are not included in the existing UNE rates for DSL loops, it is entirely reasonable that PacBell seek reimbursement from the CLECs rather than be forced to subsidize CLEC business

activities. The CLECs remain free to put forth their own position on these charges in the negotiations and in any arbitration that may be required to resolve the issue.

PacBell's reluctance to subsidize Sprint in this manner for its out-of-pocket and un-reimbursed costs in provisioning DSL lines for Sprint cannot fairly be characterized as "evidence of degraded practices being exported from SBC to Pacific Bell after their merger" as Hayes-Jayaratne-Katz and Sprint's counsel claim. Sprint's April 1 Paper at 24.

III. CONCLUSION.

Sprint's latest attempt to find support for its "negative spillover" theory draws upon a handful of anecdotes purporting to illustrate the exportation of degraded practices by SBC to PacBell following the merger. As this discussion demonstrates, however, the anecdotes relied on by Sprint -- relating to the conversion from CABS to CRIS, the inability to reach agreement on a CPP market trial, the OSS Appendix, and provisioning of DSL capable loops – do not show any degradation of practices following the merger. Indeed, PacBell's practices have improved following the merger.

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EXHIBIT 1

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PUBLIC UTILITIES REPORTS - FOURTH SERIES

CALIFORNIA

AirTouch Cellular v. Pacific Bell

Case 97-12-044 Decision 98-12-086

California Public Utilities Commission

SLIP OPINION

December 17, 1998

SYNOPSIS:

Before Bilas, president and Conlon, Knight, Jr., Duque and Neeper, commissioners.

BY THE COMMISSION:

OPINION DISMISSING COMPLAINT Summary

In this case, we are called upon to decide whether defendant Pacific Bell (Pacific) has violated any order, rule or regulation of this Commission by refusing to sell to complainant AirTouch Cellular and its affiliates (collectively, AirTouch) billing and collection services that AirTouch claims are needed to conduct the Caller Pays (CP) market trial authorized in Decision (D.) 97-06-109. Pacific contends that in view of the history of wireless services regulation by this Commission, such services are not available under the tariff in question, Section 8.5 of Pacific's Schedule Cal. PUC No.175-T.

For the reasons set forth below, we conclude that Pacific's interpretation of the tariff is correct, that Airtouch is not entitled to purchase billing and collection services under the tariff, and that Pacific has therefore not violated any order, rule or regulation of the Commission by refusing to sell AirTouch such services under the tariff. Pursuant to Section 1702 of the Public Utilities (PU) Code, the instant complaint must accordingly be dismissed.

Background of the "Caller Pays" Controversy

This complaint case arises out of disagreements between the parties as to the significance of recent changes in this Commission's policy toward Caller Pays (CP) service.

Our original policy on CP service was announced in D.90-06-025, *36 CPUC2d 464 (1990)*. After soliciting comments on whether CP should be permitted, we stated in that decision: "We concur that the LECs should not be allowed to bill the calling party at cellular service rates at this time. However, PacBell and other parties may share the results of any billing feasibility study based on the 'calling party pays' principle for our consideration, and comment by other cellular carriers. Any such billing proposal shall be made by formal application." *(36 CPUC2d at 481.)* n1

In late 1996, AirTouch filed a petition to modify D.90-06-025, in which it asked for immediate authorization to implement CP through a series of steps. First, AirTouch sought interim authority to enter into the agreements necessary to implement CP service with local exchange carriers (LECs) and vendors of Advanced Intelligent Network (AIN) services. Second, AirTouch proposed that while its petition was pending, it should be granted interim authority to conduct a market trial of CP service pursuant to the Market Trials guidelines adopted for Pacific in 1992. Third, AirTouch urged that after the market trial was concluded, it should be allowed to implement CP service on a permanent

basis through the advice letter process set forth in General Order (G.O.) 96-A, rather than through the formal application contemplated by D.90-06-025.

In D.97-06-109, we granted AirTouch authority to enter into agreements for a market trial of CP, but we declined to give permanent authorization for CP service without careful evaluation of the results of the market trial in a formal application. We concluded that this gradual approach was necessary because "Called Party Pays" had been the rule for many years in California, and we did not believe that this policy should be changed without an extensive campaign of consumer education.

Consistent with this approach, D.97-06-109 directed AirTouch and the LEC with which it contracted to take special steps to educate customers about CP service and to explore various options for offering the service. We stated, for example, that in the recorded message AirTouch proposed for informing landline customers that they would be charged at cellular rates for completing calls to cellular customers, rate information must be included, and the time within which to hang up before being charged for the call must be increased from three seconds to six seconds. (Mimeo. at 8.) We also stated that we preferred the use of prompting technology n2 to a six-second waiting period before the landline customer was charged for the call. (Id. at 9.) Finally, we directed that, pursuant to the market trial guidelines, customers in the affected geographic area n3 must be given written notice of the CP market trial in all of the languages normally used for customer bill inserts. After imposing other restrictions as well, we stated that we would evaluate the results of the market trial in a formal application seeking permanent CP authority.

It is important to note that while D.97-06-109 contemplated that either Pacific or GTE California Incorporated (GTEC) might be chosen by AirTouch to conduct the market trial, the decision did not order either LEC to take any particular action. D.97-06-109 clearly contemplated that after AirTouch chose the LEC it wanted to conduct the market trial, the parties would voluntarily negotiate the necessary agreements. Issues such as who should pay for the required customer notices were explicitly left for negotiation. (Id. at 11, n.12.)

The wrongdoing alleged in the instant complaint arises out of the negotiations that followed the issuance of D.97-06-109. In summary, AirTouch alleges that after being led to believe that Pacific was willing to negotiate the arrangements necessary to conduct the CP market trial, Pacific changed its mind and has refused in bad faith to sell AirTouch the necessary billing and collection services under Section 8.5 of Schedule 175-T. AirTouch alleges that this conduct constitutes a violation of Sections 451, 453 and 532 of the PU Code, and that it is motivated by a change in Pacific's corporate strategy resulting from its acquisition by SBC Corporation. Pacific concedes that it is concerned about the potential loss of customer good will resulting from the inclusion on bills of "third party charges" such as those for CP service, n4 but it claims that negotiations broke down largely because of AirTouch's unwillingness to pay the necessary development costs for CP service. Pacific also argues that as a matter of law, AirTouch is not entitled to purchase billing and collection services under Section 8.5 of Schedule 175-T.

Procedural History of this Proceeding

The complaint in this action was filed on December 23, 1997, about six months after the issuance of D.97-06-109. On February 17,1998, Pacific filed a motion seeking leave to submit a late-filed answer, which was attached to the motion. AirTouch did not oppose this motion.

On June 30, 1998, the assigned Administrative Law Judge (ALJ) issued a ruling convening a prehearing conference (PHC). n5 In the ruling, the ALJ first granted Pacific's motion to file its answer late. The ALJ then noted that although the "late-filed answer was not accompanied by a motion to dismiss, one of the issues the answer raises .. . . is whether dismissal of this case is appropriate." (6/30/98 ALJ Ruling, p. 2.) After summarizing Pacific's averments regarding the tariff at issue, n6 the ALJ gave the following summary of why dismissal appeared to be appropriate: "In view of the fact that D.97-06-109 does not require Pacific to enter into a contract with AirTouch, then if Pacific is correct in its interpretation of Schedule Cal. PUC 175-T, all the complaint is really alleging is a bad-faith refusal to complete contract negotiations that Pacific had led AirTouch to believe it was willing to undertake. It seems clear, however, that this Commission does not have jurisdiction over such a claim, because the Commission does not have jurisdiction to award damages for breach of contract or, in most cases, to dictate the terms of contracts to parties." (Id. at 4; citations omitted.) n7

The ALJ continued that because the complaint appeared vulnerable to a motion to dismiss, one of the issues at the PHC would be to develop a schedule for the submission of a motion to dismiss by Pacific and a reply by AirTouch. (Id. at 4-5.) A related question the ALJ wanted to consider was whether AirTouch could amend its complaint to state a cause of action. Finally, the ALJ directed the parties to indicate at the PHC whether they were willing to resume negotiations to settle their dispute. He stated that if they were not, the Commission might open a new proceeding to consider whether market trials for new wireless products should be held. (Id. at 7.) n8

The Narrowing of the Issues at the PHC

The PHC ordered in the ALJ's ruling was held on July 13, 1998. The PHC was attended not only by Commissioner P. Gregory Conlon, the assigned Commissioner, but also by Commissioner Jesse J.Knight, Jr.

On the key issue of the sufficiency of the complaint, AirTouch's counsel conceded that D.97-06-109 did not oblige Pacific to enter into any agreement or take any other particular action, and that AirTouch proposed to go forward solely on the legal question of whether it was entitled to purchase billing and collection services under the tariff:

"[W]e believe that the issue of whether . . . Pacific Bell has refused to provide a tariffed service, the billing and collection service, in violation of the Public Utilities Code, is a legal issue, [that] there are no material facts in dispute, and we believe that it is subject to a motion for summary judgment in our favor that we would intend to file and believe that . . . that issue can be resolved in that manner.

"As to the other issues in the Complaint, the fact is, as Your Honor . . . mentioned, [D.97-06-109] is permissive. We would agree with that." (PHC Transcript, p. 27.)

Later in the PHC, Commissioner Conlon expressed the hope that the parties could settle their dispute other than through motions, and he strongly encouraged them - as did Commissioner Knight - to explore options for settlement. It was finally agreed that the parties would hold settlement discussions within the next few weeks, that they would submit a status report on their negotiations by August 3, 1998, and that if these further settlement efforts failed, AirTouch would file a motion for summary judgment, and Pacific would file a motion to dismiss, fully analyzing their respective theories of the case.

On August 3, 1998, AirTouch and Pacific submitted a four-page Joint Status Report on their settlement discussions. The parties stated their respective positions and described several alternatives they had considered. However, they concluded that they were "diametrically opposed" on the key issues, because Pacific continued to be unwilling to provide billing and collection services under its tariff, whereas AirTouch "believes that Pacific's billing and collection services are essential to an effective market trial of [CP] service."

Pursuant to the procedural plan agreed to at the July 13 PHC, Pacific filed a motion to dismiss the complaint on August 17, 1998, and AirTouch filed what it called a motion for partial summary judgment on the tariff issue. Each party filed a reply and opposition to the other party's motion on August 31, 1998.

Summary of the Parties' Positions

A. AirTouch's Position

In its motion for partial summary judgment, AirTouch contends that it is entitled to judgment in its favor under the plain language of Section 8.5 of Pacific's Schedule Cal. PUC No. 175-T. Section 8.5.1. thereof states that Pacific "will provide Billing and Collection Services for providers of telecommunications related services and/or telecommunications related equipment as set forth in this Section 8.5. Services billed to end users under this Section 8.5 include, but are not limited to . . . Wireless Services." AirTouch contends that CP is clearly a wireless service, and therefore, AirTouch is clearly entitled under the tariff to purchase the billing and collection services it seeks.

AirTouch argues that Pacific's refusal to provide the requested services is based on three legal premises, none of which is meritorious. First, Pacific argues that at the time the tariff was filed in 1995, neither the Commission nor Pacific intended that the language quoted above would include CP. However, AirTouch continues, an argument based on intent is fundamentally inconsistent with a tariffing system: "The intent of a tariff system is that a carrier's

obligations to offer service on a nondiscriminatory basis are ensured in part by a system of publicly available schedules of rates, terms and conditions. Individual customers are not required to know of the carrier's intentions or be in possession of other specialized knowledge in order to determine what services are available and at what prices. Thus, as AirTouch noted in its original Complaint, it is also black-letter law that 'ambiguities in Pacific's tariffs must be construed against the utility and in favor of the customer.'" (8/17 AirTouch Motion, p. 6; footnote omitted.)

AirTouch emphasizes the mischief that Pacific's interpretation of its tariff could lead to: "[I]f Pacific is correct that it may refuse to offer services to carriers who seeks to use the services for purposes not contemplated at the time of the tariff's adoption, Pacific could similarly refuse to honor requests for other services sought by competitors . . . Indeed, Pacific could be free of its traditional obligation to provide tariffed services upon request whenever it could post hoc claim that a service was not 'intended' to be used for competitive purposes. It is evident that Pacific's view of the law cannot be correct, since it would inevitably lead to anti-competitive and discriminatory results." (Id. at 7.)

AirTouch vehemently disputes Pacific's second argument,

viz., that billing and collection services for CP are unavailable under the tariff because when it was filed in 1995, Commission policy prohibited CP. While conceding that this was indeed the Commission's policy, AirTouch contends that it is irrelevant to the issue of tariff interpretation: "Commission policy decisions govern carriers' behavior, but they do not change the meaning of the plain language of the tariff. Rather, the tariff is an independent document having the force and effect of law. Thus, the fact that the Commission's policy decision prohibiting the use of such services for a Caller Pays option had not yet been modified at the time this tariff language was filed is also 'irrelevant' to the question of tariff interpretation. As noted above, the tariff must be read according to its plain language; in this case that language provides that Pacific offers billing and collection services for end users' purchase of wireless services. Whether a wireless carrier is, in turn, permitted to provide a Caller Pays service is governed separately by the Commission's decisions." (Id. at 8; footnotes omitted.)

Finally, AirTouch dismisses Pacific's third argument, viz., that its tariff interpretation should be accepted because the cost of providing CP service significantly exceeds the cost of other wireless services available under Section 8.5 of Schedule 175-T. Although arguing that CP service involves no additional investment or development costs, AirTouch emphasizes that "whatever Pacific alleges about its 'costs', that is no lawful defense to a refusal to provide services offered in a public tariff." (Id. at 9-10.)

B. Pacific's Position

Pacific not only disputes AirTouch's legal conclusions, but argues that they turn the law of tariff interpretation on its head. Pacific summarizes its position as follows: "AirTouch contends that the phrase 'wireless services' in Section 8.5.1 is ambiguous, and, because it is ambiguous, it should be construed in AirTouch's favor to include [CP] service. This is plainly wrong, for the tariff considered as a whole clearly cannot apply to [CP] services. In any event, AirTouch's interpretation would have the tariff violate the Commission's prior orders regarding [CP] service . . . and would require that Pacific offer a higher cost service, one that is clearly different than 'wireless services'. . . " (8/17 Pacific Motion, p. 7.)

Elucidating its view that there is no ambiguity, Pacific argues that if AirTouch's position were to be accepted, other provisions in Section 8.5 of Schedule 175-T would make no sense. Most importantly, Pacific argues, Section 8.5.1(B) provides that bills will be rendered only for charges to the "Customer's end users,n

i.e., AirTouch's end users. But the reason AirTouch wants CP service (and the billing and collection services necessary to offer it) are so that AirTouch can bill Pacific's landline customers at cellular rates for their calls to AirTouch's cellular customers. Thus, Pacific concludes, AirTouch's interpretation of the tariff language cannot be squared with other provisions in the tariff.

Second, Pacific continues, even if the tariff were ambiguous, AirTouch's interpretation would have to be rejected. Commission decisions require that alleged tariff ambiguities must be reasonable under the circumstances, and the prohibition on CP service announced in D.90-06-25 - prohibition that was only slightly relaxed to permit a market trial in D.97-06-109 - makes AirTouch's claim of ambiguity unreasonable, according to Pacific. Pacific also argues that if AirTouch's interpretation were to be accepted, the carefully-crafted limitations on the market trial authorized in D.97-

06-109 would be gutted: "If AirTouch's argument were accepted, any wireless carrier could demand that we provide billing and collection for [CP] under the tariff, irrespective of the Commission's prohibition. We would be obligated to honor the tariff and provide the same billing and collection services to other carriers on a non-discriminatory basis, thus rendering the Commission's prohibition against [CP] meaningless. It is difficult to imagine a more serious conflict with existing policies tha[n] the one suggested by AirTouch here . . .." (Id. at 11.)

C. Discussion

Although the parties have devoted a great many pages to their respective arguments, we think this case boils down to two fundamental questions: (1) is the term "wireless services" in Section 8.5 of Schedule 175-T broad enough to include CP service, and if so, (2) should this ambiguity be construed in AirTouch's favor despite the general prohibition on CP service that was originally announced in D.90-06-025 and only slightly relaxed in D.97-06-109? For the reasons set forth below, we think both of these questions must be answered in the negative, and that the complaint must therefore be dismissed.

To begin with, Pacific is correct that in determining whether there is ambiguity about the services available under a tariff, the tariff language must be considered as a whole. As we recently reiterated in Re Southern California Utility Power Pool, D.95-07-012, *60 CPUC2d 462 (1995):* "Under generally recognized rules of tariff interpretation the tariff should be given a fair and reasonable construction and not a strained or unnatural one. All the pertinent provisions of the tariff must be considered together, and if provisions may be said to express the intention of the framers under a fair and reasonable construction, that intention should be given effect; and constructions which render some provisions of the tariff a nullity and which produce absurd or unreasonable results should be avoided . . .." *(60 CPUC2d at 471,* quoting Vultee Aircraft Corp. v. Atchison, Topeka & Santa Fe Railway Co., 46 Cal.RRC 147, 149 (1945); emphasis in original.)

In this case, several provisions of Section 8.5 would have to be ignored or stretched beyond reasonable limits to accommodate AirTouch's position that "wireless services" includes CP. Most significantly, it would be difficult to reconcile CP - under which Pacific's landline customers would be billed for their calls to AirTouch's cellular customers - with the language of Section 8.5.1 (B), which states that "bill rendering" is one of the services provided under the tariff. Section 8.5.1 (B) defines "bill rendering" as including "the preparation and mailing of statements to the Customer's end users, the updating of the balance due, the receipt of payments, treatment and collection activity, and maintenance of end user accounts." We agree with Pacific that under the plain meaning of the tariff, the term "Customer's end users" refers to AirTouch's customers, who plainly are not the persons for whom AirTouch is seeking billing and collection services here. n9

AirTouch's contention here is akin to one that we rejected in an advisory opinion in Carlin Communications v. Pacific Bell, D.87-12-017, *26 CPUC2d 125 (1987).* In that case, a provider of adult entertainment argued that live communications between its customers and employees were permitted under Pacific's 976 tariff, even though the subject matter of the tariff was interactive programs. After quoting several provisions of the 976 tariff, we noted that "if interactive program is defined to include live communication, i.e., communications between two or more 976 callers or a 976 caller and an employee of the IAS provider, the above-quoted sections of the tariff would be a nullity with respect to interactive services." *(26 CPUC2d at 132.)* Such an interpretation, we concluded, would strain "basic logic and reasoning". *(Id. at 131.)*

In Carlin, the complainant also argued that live programs should be considered within the ambit of the 976 tariff because they were not specifically excluded. We firmly reflected this proposed rule of construction, as well as the suggestion that Pacific's silence had created an ambiguity: "Carlin also claims that since the filed tariff does not expressly prohibit 'live' conversation between people in the definition of interactive, Pacific should be required to offer its billing and transport service for that type of 'interactive' communication as well. This is an unorthodox and erroneous interpretation of the tariff filing system. The regulated utility is not required to specify which services are excluded from its offer when it files a tariff seeking authorization to provide a specific service. No ambiguity was created by Pacific's tariff which particularly describes one service but is silent on other potential services." *(Id. at 132.)*

In this case, it is undisputed that at the time Pacific's Billing and Collection Services tariff was filed in 1995, Commission policy forbade the offering of CP service. *(36 CPUC2d at 481.)* It is therefore not surprising that this subject is not addressed in Pacific's tariff, and that some provisions of the tariff could not be given effect if CP service were to be offered. In keeping with the rule that the provisions of a tariff must be read as a whole, we think Section 8.5

of Pacific Schedule 175-T is not ambiguous, and that CP service is clearly not included within the ambit of "wireless services" as that term is used in Section 8.5.1.

A recent decision distinguishing Carlin makes it appropriate to consider whether a "latent" ambiguity might have been created in the tariff by virtue of D.97-06-109's authorization of a limited CP market trial. In MCI Telecommunications Corp. v. Pacific Bell, D.95-05-020, *59 CPUC2d 665 (1995),* n10 the issue was whether Pacific had acted unlawfully by continuing to "bundle" Centrex and intraLATA toll service, even though it was technologically possible through the use of flexible route selection (FRS) and automatic route selection (ARS) to route a Centrex customer's intraLATA toll calls to a competing carrier. In opposing a motion for a preliminary injunction, Pacific argued that its practice was permissible under its FRS/ARS tariff, since the tariff was silent on using ARS/FRS for intraLATA toll calls. Relying expressly on Carlin, Pacific argued that it was not required to enumerate services not offered in its tariff.

We disagreed, finding that the authorization for intraLATA toll competition in the IRD decision (D.94-09-065) had created a latent ambiguity in the FRS/ARS tariff: "[A]s in Carlin, no patent ambiguity is created by Pacific's tariff in offering one service (FRS/ARS routing) but maintaining silence on other potential services (such as interLATA and intraLATA toll calls). The ambiguity that Pacific's tariff creates by its silence is a latent ambiguity. The latent ambiguity arises from the added fact that PRS/ARS routing can be used for [intra-and] interLATA toll call routing, despite the silence of the tariff on the subject. So, unlike Carlin, Pacific's tariff in the present case is ambiguous." *(59 CPUC2d at 683;* footnote omitted.)

Based on this latent ambiguity, we concluded that the ambiguity must be construed against Pacific, and that MCI was therefore likely to prevail on the merits of its tariff violation claim against Pacific.

It is evident from a careful review of the MCI case that it is distinguishable from the situation here, and that the circumstances that made it appropriate to find a latent ambiguity in the tariff there do not justify finding a latent ambiguity in the Billing and Collection Services tariff at issue here. First, it appears that in

MCI, the ambiguity brought about by the IRD decision was linguistically reasonable, because the interpretation argued for by MCI did not have the effect of rendering other provisions in the FRS/ARS tariff meaningless. (*Id. at 682-83.)* Second, Pacific apparently conceded that using FRS/ARS to route Centrex toll traffic to competing carriers was consistent with IRD policies, and that the only reason the tariff had not been amended to provide expressly for such routing was that the issue had been overlooked." n11

In the present case, by contrast, neither of these factors holds true. As discussed above, construing the term "wireless services" in Section 8.5.1 to include CP would distort or render meaningless other provisions in the Billing and Collection Services tariff, especially those relating to "bill rendering". Second, and more importantly, D.97-06-109 did not - unlike IRD and intraLATA toll service - decide that the existing restrictions on CP service should be generally lifted. Instead, D.97-06-109 decided that the prohibition on CP service should remain in place until a market trial had been conducted and the results of that trial had been carefully evaluated in a formal application. We agree with Pacific that if we were to find a latent ambiguity in the tariff here, Pacific "would be obligated to honor the tariff and provide the same billing and collection services to other carriers on a non discriminatory basis, thus rendering the Commission's [continued] prohibition against [CP] meaningless." (8/17 Pacific Motion, p. 11.) We made it very clear in D.97-06-109 that while additional market trials might be allowed in some circumstances, they would be looked on with disfavor, and that company-wide trials of CP would not be permitted. n12

We find bizarre AirTouch's contention that the tariff is a "separate, independent document", the meaning of which can be determined totally apart from the Commission's policy decisions about the services covered by the tariff. (8/17 AirTouch Motion, p. 8; 8/31 Reply, p. 5.) If we were to accept this theory, the meaning of tariffs could never be certain, and utilities would find themselves obliged to offer services that neither they nor the Commission ever contemplated when the tariff was drafted and filed. Pacific is only slightly exaggerating when it says that if Airtouch's theory of tariff interpretation were to be accepted: " . . . [C]ompeting carriers and customers alike would strain to create ambiguities in the scope of services offered under local tariffs, and twist the language into the most whopping ambiguities conceivable, merely to get local exchange customers and/or shareholders to subsidize their operations. Once again, the question is not as absolute as AirTouch claims - the issue is one of reasonableness in determining whether [a tariff] ambiguity exists and how to interpret the ambiguity." (8/31 Pacific Reply, p. 5; footnote omitted.)

Pacific's understanding of this basic rule of tariff interpretation is correct. As we recently stated in Southern California Utility Power Pool: "While it is a general rule of tariff interpretation that any ambiguities or uncertainties in a tariff must be resolved in favor of the party obligated to pay the tariff charges . . ., 'the ambiguity must be a reasonable one. In the exercise of its discretion the Commission may determine whether an interpretation of a tariff rule, as sought, is reasonable. Accordingly, such claimed ambiguities must have a substantial basis and be considered in light of Commission decisions which set forth the policy on the matter in dispute.'" *(60 CPUC2d at 471,* quoting Pacific Gas and Electric Co., *19 CPUC2d 105, 110 (1985);* emphasis supplied)

Under the policies governing CP service set forth in D.97-06-109, there is no reasonable basis for arguing that there is an ambiguity in the Billing and Collection Services tariff at issue here. D.97-06-109 decided that the general prohibition on CP service should remain in effect, and relaxed it only to the extent of authorizing a market trial under carefully restricted conditions. No tariff changes were ordered by the decision, and it was left up to AirTouch and the LEC chosen by it to negotiate the agreements necessary to conduct the market trial.

As the history of this complaint case demonstrates, negotiating those agreements has proven very difficult for a variety of reasons. We are not unmindful of the fact that - as the quotation in footnote 4 shows - Pacific has business reasons as well as legal ones for taking the position that it has on tariff interpretation. n13 But that is not a sufficient reason to hold, as AirTouch would have us do, that a tariff that all parties had understood as not including CP service was magically transformed, by virtue of the limited market trial authorized in D.97-06-109, into a tariff in which CP service was freely available.

Since AirTouch has elected to proceed only under the theory that Pacific's refusal to sell billing and collection services is a violation of its tariff, and we have found that theory to be without merit as a matter of law, AirTouch has failed to meet its burden of proof under PU Code 1702. Accordingly, the instant complaint must be dismissed.

Findings of Fact

1. In OP 5 of D.90-06-025, the Commission forbade LECs from entering into billing arrangements with cellular carriers whereby an LEC landline customer initiating a call to a cellular customer would be billed for the call at cellular rates.

2. In D.97-06-109, the Commission granted in part a petition by AirTouch to modify OP 5 of D.90-06-025. Under D.97-06-109, the general prohibition on CP service continued in effect, but AirTouch was authorized to enter into contracts with an LEC in order to conduct a market trial of CP. D.97-06-109 did not order any particular LEC to take any particular action to help bring about the authorized CP market trial.

3. In the Summer of 1997, AirTouch and Pacific entered into negotiations for the market trial, but the negotiations fell apart over a variety of issues.

4. On December 23, 1997, AirTouch filed the instant complaint The complaint alleged two violations: (a) that Pacific had violated PU Code §§ 451, 453 and 532 by refusing to sell billing and collection services to AirTouch under the applicable tariff, and (b) that Pacific's refusal to provide these services was inconsistent with and a violation of D.97-06-109.

5. On February 17, 1998, Pacific filed a motion seeking leave to submit a late-filed answer to the complaint.

6. On June 30, 1998, the assigned ALJ issued a ruling convening a PHC to discuss the infirmities of the complaint and other issues.

7. The ALJ's June 30, 1998 ruling granted Pacific's motion to file late its answer to the complaint.

8. The PHC convened by the ALJ was held on July 13, 1998. In addition to the parties, the PHC was attended by Commissioners Conlon and Knight.

9. At the July 13 PHC, AirTouch agreed that D.97-06-109 was permissive in character and did not oblige Pacific to take any particular action with respect to the market trial authorized for CP service. AirTouch also agreed that in the event the matter could not be settled, it wished to proceed solely on the theory that, as a matter of law, it was entitled to purchase billing and collection services under the applicable Pacific tariff, Section 8.5 of Cal. PUC Schedule No. 175-T.

10. At the July 13 PHC, the parties agreed to resume settlement negotiations and to submit a status report concerning these negotiations. It was agreed that in the event the negotiations were unsuccessful, Pacific would file a motion to dismiss the complaint, and AirTouch would file a motion for summary judgment on its tariff theory.

11. On August 3, 1998, Pacific and AirTouch submitted a joint status report on their settlement negotiations. The report indicated that while they had discussed many issues related to the instant controversy, they remained "diametrically opposed" on the key issues.

12. On August 17, 1998, Pacific filed a Motion to Dismiss the complaint, and AirTouch filed a motion for partial summary judgment in its favor on the tariff issue.

13. On August 31, 1998, Pacific and AirTouch each filed a response and opposition to the other's motion.

Conclusions of Law

1. Pursuant to Rule 4(b)(2) of the Rules of Practice and Procedure, this case is not subject to the SB 960 rules set forth in Article 2.5, because a hearing is not necessary.

2. Pacific's Billing and Collection Services tariff does not explicitly provide that services under it are available to wireless carriers seeking to furnish CP.

3. In determining a tariff's meaning, all of the tariff's provisions must be read as a whole, and constructions which would render some provisions a nullity or significantly distort them should be avoided.

4. If we were to accept AirTouch's position that the term "wireless services" in Pacific's Billing and Collection Services tariff includes CP service, then Section 8.5.1 (B), which defines "bill rendering," would be rendered a nullity.

5. Under the Commission's rules governing tariff construction, a utility submitting a tariff is not required to enumerate services that might have been but are not offered under the tariff.

6. At the time Pacific's Billing and Collection Services tariff was filed in 1995, Commission policy forbade the offering of CP service, and the tariff was silent on the question of whether CP services were available under the tariff.

7. CP service is not included within the term "wireless services" as used in Pacific's Billing and Collection Services tariff, and the tariff is not ambiguous on this score.

8. Whenever an ambiguity is claimed to exist in a tariff, the alleged ambiguity must have a substantial basis, and be reasonable in light of the Commission's decisions setting forth its policies on the matter in dispute.

9. The Commission's decision to authorize a limited market trial of CP service in D.97-06-109 did not create a latent ambiguity in Pacific's Billing and Collection Services tariff with respect to whether the term "wireless services" included CP services.

10. If AirTouch's ambiguity argument were to be accepted, Pacific would be obliged to offer CP services under its tariff to all wireless carriers who requested them, despite the clear intention of D.97-06-109 that there should be only one market trial of CP, and that it should be limited in its geographic scope and the number of customers included.

ORDER

IT IS ORDERED that:

1. The complaint herein is dismissed.

2. This proceeding is closed.

This order is effective today.

Dated December 17, 1998, at San Francisco, California.

P. GREGORY CONLON, Commissioner, dissenting

I dissent from the majority opinion because the opinion is still very anti-competitive and pro-monopolistic, and effectively kills our inquiry into Caller Pays, a service that could have potentially led to the challenge by cellular carriers of the local exchange market. With their vote today, the Commissioners in the majority supported the maintenance for the foreseeable future of a regulatory policy against this service that may be outdated. This decision also helps cement the monopoly position of Pacific Bell and GTE-California.

It is important to restate that it is this body which presents the greatest obstacle to Caller Pays for the cellular industry. When we issued Decision (D.) 90-06-025, we prohibited Caller Pays essentially out of concern for wireline telephone customers being asked to shoulder cellular air time charges which were higher than regular telephone rates. We lifted this prohibition in D.97-06-109 for the very limited purpose of allowing AirTouch to conduct a test of Caller Pays to assess public reaction. Our continuing concerns with the service were reflected in the consumer-protection measures adopted in the latter decision. Still, this Commission expected that a test would be conducted, that results would be available for our evaluation, and that our policy against Caller Pays would be revisited in the context of said results. The instant complaint arose out of AirTouch's and Pacific Bell's inability to come to an agreement on the test. The majority opinion compounds the problem by not following through and getting the Commission involved in the Caller Pays test as soon as possible. Hence, this Commission's desire to look into Caller Pays, as expressed in D.97-06-109, has been effectively thwarted.

Further, I believe the status quo which remains after today's decision favors the incumbent local exchange companies. With the generally slow progress in the development of facilities-based competition in the local exchange market, I hold that we must enable carriers such as cellular companies to become more full-fledged rivals of Pacific Bell and GTE-California. Caller Pays is the paradigm experienced by every wireline caller dialing another wireline customer. Further, in general, each wireline company bills its customers for calls initiated by those customers to other wireline end users, regardless of which carrier provides service to the called parties. Even in the long-distance business, where some companies are performing their own billing, it is the subscribing end-user who receives the bill. In supporting D.97-06-109 last year, I began to recognize that wireless providers, if they are to become effective challengers to wireline companies, might benefit greatly from the Caller Pays protocol.

We might pin our hopes for the Caller Pays test becoming a reality on AirTouch's use of a third-party billing agent. However, I am convinced that customers receiving a bill from a carrier they never subscribed to, i.e., AirTouch, or for that matter, any wireless carrier, will mean instant failure to the Caller Pays test. This test requires the participation of an incumbent local exchange company. Then, and only then, will AirTouch be on par with every wireline company providing service in California. Then, and only then, will we fulfill our desire for technology-neutral policies as stated in our report to Governor Wilson in November 1993 entitled Enhancing California's Competitive Strength: A Strategy For Telecommunications Infrastructure. Until this occurs, the market will fail, and the Commission will be choosing winners and losers rather than letting the market do so. SAN FRANCISCO, CALIFORNIA DECEMBER 17, 1998 /s/ P. Gregory Conlon MEMBER OF THE COMMISSION FOOTNOTES

n1 This discussion was incorporated into Ordering Paragraph (OP) 5 of D.90-06-025, which stated: "LECs shall not enter into a billing arrangement with cellular carriers to bill cellular rates to landline customers initiating a call to a cellular customer at this time." *(36 CPUC2d at 516.)*

n2 With prompting technology, a call is completed only if the caller responds to an oral prompt stating that by pressing a particular digit, he or she will be accepting the charges for the call. Prompting technology has been used extensively with telephone systems such as those in prisons. See, e.g., D.93-08-012 and D.95-10-013.

n3 Under the market trial guidelines that we directed be used, a market trial must be limited in geographic scope, and may include only 5% of the LEC's residential customers, or 15% of its business customers. (Id. at 11.)

n4 In its August 17, 1998 Motion to Dismiss the complaint, Pacific states:

"Our customers are increasingly concerned over the amount and number of charges on their local telephone bills. To respond to these concerns, we are attempting to limit the number of third-party charges appearing on our bills for many services, not just [CP]. We should not be forced to bear the loss of our customers' good will, and be competitively disadvantaged, merely because AirTouch wants to place its [CP] charges on our bills and have us collect those charges on its behalf." (8/17 Motion, p. 2.)

n5 Administrative Law Judge's Ruling Convening Prehearing Conference, issued June 30, 1998 (6/30/98 ALJ Ruling).

n6 In doing so, the ALJ noted that Pacific's position on the unavailability of CP service under the Billing and Collection Services tariff appeared consistent with positions it had previously taken. The ALJ stated:

"Pacific's position that billing and collection services for CP are not available under Schedule Cal. PUC No. 175-T, and that negotiations would be necessary to develop a tariff for such services, appears to be consistent with the Response that Pacific filed on October 11, 1996 in support of AirTouch's petition to modify OP 5 of D.90-0[6]-025. In that Response, Pacific stated that 'we agree with AirTouch that the LEC should be permitted to explore offering [CP] billing and collection service,' and that

'the normal tariff process will allow the Commission the opportunity to review any proposed service offering and assure that the appropriate consumer safeguards have been addressed.'" (6/30/98 ALJ Ruling, mimeo. at 3, n. 2; emphasis in original.)

n7 In a footnote, the ALJ noted that "the caselaw cited in the text on the Commission's jurisdiction over contract disputes is not exhaustive, and is certainly no substitute for full briefing by the parties on the extent of such jurisdiction." (Id. at 5, n.3.)

n8 In his June 30 ruling, the ALJ also stated that it appeared unlikely this case was subject to the Commission's SB 960 rules. Although the complaint was clearly subject to Rule 4(b)(2), the ALJ noted that under this rule, "a complaint filed before January 1, 1998 is subject to the new SB 960 rules only if it is eventually determined that a hearing should be held." (6/30/98 ALJ Ruling,

mimeo. at 7.) The ALJ continued that it appeared unlikely a hearing would be necessary in this case because of the complaint's apparent vulnerability to a motion to dismiss. However, if it was eventually determined that a hearing was necessary, the ALJ stated that the SB 960 rules would be applied. (Id.)

In view of the parties' preference for resolving this case on the pleadings, and our decision that dismissal of the complaint is warranted, the SB 960 rules do not apply here.

n9 In its August 31 reply to AirTouch, Pacific points out that this understanding of the term "Customer's end users" is consistent with the first sentence of Section 8.5.3 of the tariff, which concerns the purchase of accounts receivable. (8/31 Pacific Reply, p. 3, n. 8.) This sentence states that "the Utility [i.e., Pacific] will purchase, on a regular basis, the Customer's accounts receivable based on Transactions accepted by the Utility for billing to the Customer's end users." This language does not indicate an intent by Pacific to purchase accounts receivable from AirTouch for AirTouch's charges to its own customers.

n10 Although AirTouch relies heavily on MCI to support its position, it also cites several decisions of the Federal Communications Commission (FCC) as support for its tariff interpretation arguments. We have reviewed these decisions, but believe they are quite consistent with our resolution of the issues. For example, in *Associated Press, 72 FCC2d 760 (1979),* the FCC quoted its earlier decision in *Commodity News Services, Inc., 29 FCC 1208,* aff'd *29 FCC 1205 (1960),* to the effect that while tariff ambiguities must be construed against the utility, it is also the case that

"tariffs are to be interpreted according to the reasonable construction of their language . . ." *(72 FCC2d at 764 65;* emphasis supplied.)

The Commission cases cited by AirTouch are either inapposite or consistent with our resolution of the issues here. For example, AirTouch cites Kings Alarm Systems v. PT&T, *81 CPUC 283 (1977)* for the proposition that "the intention of the framers of tariffs cannot be given controlling weight." (8/17 AirTouch Motion at 5, quoting *81 CPUC at 287.)* Kings is inapposite here, because the issue in that case was not whether certain services were available under the tariff, but which of two clearly-defined rates should be charged for the services. In any event, as indicated in the text, we are relying principally on the Commission's intent as expressed in D.90-06-025 and D.97-06-109 to support our conclusion that the language in Pacific's Billing and Collection Services tariff is unambiguous with respect to the availability of CP services.

n11 In summarizing the comments on the ALJ's proposed decision, D.95-05-020 states:

"Pacific [argues] that this Commission created the ambiguity in IRD, Pacific's conduct was no violation before January 1, 1995, and therefore, in effect, it was not Pacific's fault that the 'hundreds if not thousands of tariff sheets [that] were changed for IRD' did not correct this ambiguity. But as Pacific notes, it was on notice that we expect telephone utilities to be 'vigilant to insure that their tariffs are comprehensive and clear.'" *(59 CPUC2d at 696, n. 15;* citation omitted.) .in 0

n12 Footnote 14 of D.97-06-109 noted that the Commission resolution authorizing market trials, Resolution T-14944, had expressed concern about not disadvantaging competitors by permitting Pacific to conduct market trials. These concerns raised the issue, we said, of whether other wireless providers should be allowed to conduct CP market trials. We concluded:

"If such additional [market] trials were to be permitted, they could effectively gut the prohibition in Resolution T-14944 against state-wide [market] trials. Accordingly, we have concluded that, as long as the LEC selected by AirTouch submits the market trial description [required herein] within 120 days of the effective date of today's decision, and the actual trial begins within 210 days after the effective date, the instant trial is the only trial of CP that should be permitted for the time being." (Mimeo. at 11; emphasis supplied.) Even though the CP market trial authorized in D.97-06-109 did not begin within 210 days of that decision (owing to the dispute between Pacific and AirTouch), no other carrier has applied to conduct a CP market trial.

n13 We are also mindful, however, that Pacific's position on the scope of services available under its Billing and Collection Services tariff appears to have been consistent since 1996. See footnote 6, supra. We are also aware of Pacific's claim that after the issuance of D.97-06-109, it negotiated with AirTouch over the arrangements necessary for a CP market trial, but that the negotiations fell apart because AirTouch was unwilling to pay a fair share of the market trial expenses. (8/17 Pacific Motion, p.4, n.8.) /bn